IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TRACY B. WHEATON and MAY L. WHEATON, husband and wife,	)	**No. 27392-0-III**
Respondents,	)	
v.	)	
MARK R. CARPENTER and KAREN S. CARPENTER, husband and wife,	)	**Division Three**
Appellants,	)	
DAROLD W. STALEY and DEANNA L. GILL, husband and wife,	)	
Defendants.	)	**UNPUBLISHED OPINION**

Korsmo, J. — This appeal involves a dispute between neighbors concerning use of an easement to access their properties. After a bench trial that included a visitation to the scene, the trial court carefully crafted an equitable solution designed to benefit all parties and limit the need for further litigation. However, some of the solutions were beyond the

court's equity powers. We affirm in part and reverse in part.

FACTS

The property in question is in rural, open range land northwest of Curlew. At one time the property was owned by Richard and Sarah Johnson of Gig Harbor, who used the land as a summer home. Their summer residence was in the western section of the 120 acre parcel and was accessed by a dirt road that generally ran east across the middle of the parcel. This road later became known as Johnson Lane.

The entire property was fenced around the perimeter. A gate existed at the eastern edge of the property and typically would be closed when cattle were grazing in the immediate vicinity. It also was closed and locked when the Johnsons were in Gig Harbor, but usually remained open each summer when they were in residence on the property.

The Johnsons eventually started to subdivide the property. They granted a 60 foot wide easement across the properties that could, if subdivision required it, be converted to a public road. It followed Johnson Lane. As relevant here, the land was divided into three roughly equal tracts; Johnson Lane bisected each tract. Tract C, the western edge of the parcel, contained the Johnson summer home. Tract B was the middle third of the parcel. The eastern third became Tract A. Tract B was the first property sold. Darold

Staley purchased it in 1994 and took up permanent residence there the following year. At that point Mr. Johnson told him the eastern gate was no longer needed. The gate was left permanently open and fell into disrepair. Tract C was purchased by Tracy and May Wheaton in 1997. The eastern gate was at that time overgrown with weeds. In 2003 the Wheatons brought in a new home. They took the gate posts down at that time.

In 2004, Mark and Karen Carpenter purchased Tract A and began construction of their home. The entrance to Johnson Lane was widened to accommodate the construction. The Carpenters moved onto the property, accompanied by their developmentally disabled son.

By September 2006, the Carpenters became concerned about cattle grazing near their eastern fence. They installed two 10-foot metal gates that would swing together and lock in the middle to fill in the gap in the eastern fence. Anyone using Johnson Lane would have to pass through this gate (Gate One).

The Carpenters also noticed that some of the northern portion of the fence between their property and Tract B was down. They posted notice of their intent to put a gate (Gate Two) along Johnson Lane between Tract A and Tract B unless the fence was fixed. Mr. Staley and his wife, Deanna Gill, already had a gate at that location, but they kept it open except on a few occasions when their horses got loose. The Carpenters

subsequently installed Gate Two in November 2007.

Neighborly relations deteriorated. The Carpenters insisted on keeping the gates closed, while the Wheatons and Staley-Gills left them open. The Carpenters would watch the road and close the gates when the others left them open. The Carpenters would also close gates when traffic was oncoming, forcing the Wheatons and Staley-Gills to exit their cars to open the gates. Trial testimony established it could take five or six minutes to open and drive through both gates, and that the gates were difficult to operate in winter. The Wheatons vandalized the gates and demonstrated other "inappropriate behavior" toward the Carpenters. Clerk's Papers (CP) 214. The Carpenters posted signs at Gate One. Among them were signs that stated, "No Trespassing," "Private Driveway," and "Keep the Gate Closed." CP 213.

The Wheatons filed suit for declaratory judgment and injunctive relief against the Carpenters and the Staley-Gills. The Staley-Gills stipulated to injunctive relief requiring them to keep their horse gate open. The claim against them was then dismissed. The Carpenters filed a counterclaim and a cross-claim to the original action, asking for injunctive relief requiring the Wheatons and Staley-Gills to keep the gates closed and refrain from vandalism.

The trial court denied competing motions for summary judgment. A temporary

injunction was entered requiring the Carpenters to keep the gates open and remove their signs from the entrance to Johnson Lane. The case ultimately proceeded to a two day bench trial in the Ferry County Superior Court. The court ruled that the two gates would have to be permanently removed and that the signs would have to be relocated to the Carpenters' personal driveway. The court also directed the Carpenters to erect a fence along the south side of Johnson Lane to protect their property. The Wheatons were ordered to contribute $1,000 toward the cost of the fence. The Carpenters were also prohibited from building speed bumps or placing other impediments across the lane.

The Carpenters appealed to this court. Our Commissioner partially stayed the judgment of the trial court. The gates did not have to be removed, but had to stay open. The Carpenters did not have to immediately build the fence.

ANALYSIS

The primary thrust of this appeal is to challenge three of the four types of injunctive relief granted by the trial court: (1) removal of the two gates; (2) construction of the fence; and (3) relocation of the signs.[1] We will address those issues in the noted order. The appeal also challenged nine findings of fact entered by the trial court. We

[1] The trial court also prohibited the Carpenters from erecting speed bumps on the lane or from placing obstructions on it, but struck proposed language that would have prohibited using culverts to divert water. CP 219. None of the parties challenge this ruling.

have carefully reviewed the evidence and agree that several of the findings are not fully supported by the evidence.[2] However, because the challenged findings are not germane to our analysis, we will not belabor this opinion by discussing them.

This court reviews the decision to grant an injunction, and its terms, for abuse of discretion. *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000). The trial court has broad discretionary power to fashion appropriate injunctive relief necessary to fit the circumstances of the case before it. *Rupert v. Gunter*, 31 Wn. App. 27, 30, 640 P.2d 36 (1982). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Gate Removal. The trial court determined that the gates unreasonably burdened the use of the easement by the Wheatons and Staley-Gills. We agree.

The initial question to resolve is whether the easement contemplated gates. An easement is interpreted to give effect to the original intent of the parties. *Brown v. Voss*, 105 Wn.2d 366, 371, 715 P.2d 514 (1986); *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 241, 23 P.3d 520, *review denied*, 145 Wn.2d 1008 (2001); *Rupert*, 31 Wn. App. at 30-31. If the grant is silent on the topic of gates, then courts will try to

[2] The challenged portions of Findings of Fact B, I, K, K, O, and P, in various degrees, are not supported by the evidence. CP 210, 212-213, 215-216.

discern the intent by looking at the circumstances of the case, the situation of the property, and the manner in which the easement has been used. *Rupert*, 31 Wn. App. at 30-31 (citing *Evich v. Kovacevich*, 33 Wn.2d 151, 204 P.2d 839 (1949)). Additionally, "When the owner of a servient estate is being subjected to a greater burden than that originally contemplated by the easement grant, the servient owner has the right to restrict such use and to maintain gates in a reasonable fashion necessary for his protection, as long as such gates do not unreasonably interfere with the dominant owner's use." *Rupert*, 31 Wn. App. at 31.

Here, the easement grant is silent on the topic of gates. The next inquiry concerns what the surrounding circumstances suggest about the intention of the parties. The neighboring land was still used by cattle, but no efforts were made to require or even permit a gate at the east end of the Johnson property. Once Tract B was sold off, Mr. Johnson recognized there was no need for the east gate and left it open. The grant also expressly recognized that the easement might need to be expanded and perhaps dedicated to the public. In summary, the easement clearly favored use for ingress and egress and was not concerned about privacy or safety. The circumstances suggest that gates were not favored by the easement grant.

The Carpenters also were not subject to a greater burden that would have justified

adding the gates. The occasional cattle straying onto the property was known at the time the Johnsons lived on the land, but was not seen as a reason to gate the easement once the tracts were developed. The increased incidents of vandalism were largely *after* the gates went up and, indeed, were directed primarily at the gates. The record simply does not suggest that the gates were necessary to address a developing problem unknown or unimagined at the time of the easement. The facts of this case are far different from those in *Standing Rock* where this court upheld the decision to put up gates along an easement. There, significant evidence of vandalism, trespass, increased road maintenance costs, and increased traffic justified the use of gates to reduce the burden on the servient estate. *Standing Rock*, 106 Wn. App. at 241-242.

The record also supports the trial court's determinations that the gates unreasonably hindered the Wheatons and Staley-Gills. The addition of five minutes to each trip certainly adds up to significant time lost during the course of a year. The difficulties the gates created in the winter were also documented. The gates also discouraged visitors and delivery people.

On top of the demonstrated inconveniences is the behavior of the Carpenters. Gate Two was added, not to address a problem, but to attempt to coerce the Staley-Gills into fixing a different portion of their fence. In addition, the actions of the Carpenters in

closing gates in the face of oncoming traffic showed clear intent to impede use of the easement. Far from providing security or privacy, these gates were used to annoy and spite the neighbors. In light of the total situation, the trial court's decision to direct the removal of the gates was based on very tenable grounds.[3]

The decision to remove the gates is very well supported in the record. There was no abuse of discretion with respect to removing the two gates across Johnson Lane.

Easement Fence. The trial court directed the Carpenters to build a fence on their property along the southern side of the easement lane and also ordered the Wheatons to pay $1,000 to help with the cost of constructing the fence. The Carpenters protest this order, arguing that the trial court lacked authority to compel this action. We agree.

This case was an action to construe and enforce an easement. The trial court's equitable powers with respect to the injunction and its terms simply do not extend to telling the Carpenters how to use their property as long as the property is not infringing on the easement. Our Supreme Court once observed: "It is only when an unreasonable or unlawful use of land by one property owner infringes upon some right of another in the reasonable use and enjoyment of his land that equity will intervene." *McInnes v. Kennell*, 47 Wn.2d 29, 38, 286 P.2d 713 (1955). The Carpenters did not use the land to interfere

[3] The Carpenters also challenge the trial court's failure to require that the respondents keep the gates closed. In light of our conclusion that the trial court did not err in directing the gates be removed, we will not separately address that claim.

with the use of the easement by the Staley-Gills and the Wheatons. Rather, they interfered with the easement by gating it. The fence remedy did not relate to the easement and, hence, it was not a proper use of the court's injunctive and equitable powers relating to the roadway.

It was, however, a fair and just answer to the Carpenters' concerns about trespassers and marauding cattle threatening their son and the southern half of their property. Counsel for the Carpenters told this court at argument that his clients preferred not to have the fence, even if the gates were ordered removed. Thus, while we believe that the trial court's remedy was an ideal solution for the parties, we cannot allow it to stand.

The requirement that the Carpenters fence their land with contribution from the Wheatons exceeds the scope of the court's powers in remedying the easement access issue. Accordingly, we direct the court to remove that remedy.

Signs. The Carpenters also argue that requiring them to remove the signs from the entrance to their property and relocate them to their driveway violated their rights under the First Amendment and under article I, section 5 of the Washington Constitution. Again, we agree, at least in part, with the Carpenters and remand this portion for additional findings.

The First Amendment provides that no law shall abridge the freedom of speech. The parallel provision of the Washington Constitution provides that "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Const. art. I, § 5. Washington's free speech right is more expansive than the federal right guaranteed by the First Amendment. *Ino Ino*, *Inc. v. City of Bellevue*, 132 Wn.2d 103, 115, 937 P.2d 154, 943 P.2d 1358 (1997), *cert. denied*, 522 U.S. 1077 (1998). The State bears the burden of justifying a restriction on free speech. *Id.* at 114. A court can impose time, place, and manner restrictions on free speech under our state constitution when that right has been abused. *Bering v. Share*, 106 Wn.2d 212, 234, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050 (1987). Such restrictions must be content neutral, narrowly tailored to serve a compelling interest, and leave open ample alternative channels of communication. *Id.*

The trial court found that the signs posted by the Carpenters, in conjunction with the gates and the efforts to close the gates behind drivers, intimidated visitors and delivery drivers who used the lane. CP 213 (Finding of Fact L). The court ordered the signs taken off the easement near the entrance and directed that they instead be placed where they would discourage travelers from leaving the easement prematurely — at the Carpenters' driveway.

We believe that aspects of this ruling are too broad for several different reasons. First, there is no finding that the signs alone, without the gates and the efforts of the Carpenters to intimidate users, misled guests about use of the easement. In the absence of a finding that the signs alone misled the public, we question whether there has been "abuse" of our state freedom to "speak and write" about "all subjects." Const. art. I, § 5. Certainly the signs have been misleading to a degree, at least when coupled with the other factors. Abuse of the freedom of speech can lead to restrictions on subsequent speech. *Bering*, 106 Wn.2d at 234. Whether the signs alone actually abused that freedom is unclear from the court's findings and ruling. Without such a finding, there is no basis for imposing any restriction, let alone determining if the court's directive is narrowly tailored to serve a compelling interest. If the trial court did find that the signs themselves detrimentally misled visitors, it can enter appropriate findings and relief.

Second, limiting the signs to the Carpenters' driveway is questionable. The trial court ordered the signs off of the easement. That was proper. Whether the Carpenters will want to place any more signs in the eastern boundary area is at this point uncertain. The easement is a 60-foot wide swath, 30 feet on either side of the center of Johnson Lane. The signs can clearly be prohibited throughout the width of the easement, even if the entire land is not currently being used for travel. However, the Carpenters have the

right to post signs on their own property. Absent a showing that signs posted on Tract A outside of the easement have misled the public about use of the easement, the current restriction is overly broad and does not leave open *ample* alternative methods of speech. The Carpenters may well believe that their message is best expressed along the eastern border of their property. Without a showing that misleading signs were posted on Carpenter property that was outside of the easement, the current restriction is too broad.[4]

Once again, we note that the trial judge directed placement of the signs at the location where it was most appropriate to express the sentiments the Carpenters wished to share with the public. Their driveway was the first place that travelers could go amiss and leave the easement, thus trespassing on private property. Signs placed at that location would assuredly effectively convey that message. However, we agree with the Carpenters that their driveway is not the *only* location they can post their message. As we read this record, limiting the message to that location is not appropriate.

Whether removal of the signs to a different location was the narrowest method of dealing with the problem is also something we question. In the event that misleading signs did exist, the trial court would have to consider all possible alternatives. For instance, permitting the Wheatons to post additional signs ("Public Access to Wheaton

[4] If the signs were outside the easement, the trial court can enter additional findings concerning where the existing signs were placed and consider appropriate relief.

and Staley-Gill property here") in order to correct misleading language might be an appropriate remedy that would not interfere with the Carpenters' message.

We remand this issue to the trial court to strike those portions of its ruling that limit the Carpenters to posting signs at the entrance to their driveway. Should they post signs in other locations that serve to mislead travelers along the easement, the parties are free to seek additional relief. Additionally, if the trial court intended to prohibit signs at the eastern boundary because of prior abuse, it can enter appropriate findings that would justify such relief.

Attorney Fees. Both sides seek costs and attorney fees in this action. Since there is no substantially prevailing party, we deny the requests. RAP 14.2. Each side will bear its own costs.

CONCLUSION

The trial court wisely entered a fair ruling that balanced the competing rights of the parties. They would have been well-served by accepting that ruling. However, they have not. We affirm the decision to remove the gates and reverse the order to build a fence. We also reverse the sign relocation order and remand for further findings, if necessary.

A majority of the panel has determined this opinion will not be printed in the

Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Kulik, A.C.J.

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Brown, J.